INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
1. Proceedings Below	5
2. Period of Limitations	7
3. Sole Human Conspirator	7
4. Interpolation of Net Worth	8
REASONS FOR GRANTING THE WRIT	9
1. Period of Limitations	9
2. Sole Human Conspirator	13
3. Interpolation of Net Worth	15
CONCLUSION	16
APPENDIX: OPINION IN THIS CASE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT	1a

CITATIONS

CASES:

Alamo Fence Co. v. United States, 240 F.2d 179 (5th Cir. 1957)	14
American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943)	14
Benton v. Maryland, 395 U.S. 784 (1969)	14
Braverman v. United States, 317 U.S. 49 (1942)	10, 12
Cape Cod Food Products, Inc. v. National Cranberry Ass'n, 119 F.Supp. 900 (D. Mass. 1954)	14
Clyatt v. United States, 197 U.S. 207 (1905)	14
Ehlers v. Vinal, 253 F.Supp. 58 (D. Neb. 1966), aff'd, 382 F.2d 58 (8th Cir. 1967)	15

Page

Gebardi v. United States, 287 U.S. 112 (1932)..... 14
Grunewald v. United States, 353 U.S. 391 (1957) 9, 12
Holland v. United States, 348 U.S. 121 (1954) 15
Joplin Mercantile Co. v. United States, 213 Fed. 926 (8th Cir. 1914), aff'd, 236 U.S. 531 (1915)..... 14
Kotteakos v. United States, 328 U.S. 750 (1946) 14
Schaeffer v. United States, 362 U.S. 511 (1960)..... 14
Shaw, W. A., 27 T.C. 561 (1956), aff'd, 252 F.2d 681 (6th Cir. 1958) 15
Silber v. United States, 370 U.S. 717 (1962) 14
Smith v. United States, 335 F.2d 270 (D.C. Cir. 1964).. 14
Thompson v. City of Louisville, 362 U.S. 199 (1960).. 14
Union Pacific Coal Co. v. United States, 173 Fed. 737 (8th Cir. 1909) 13
United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963), cert. denied, 375 U.S. 940 14
United States v. Carroll, 144 F.Supp. 939 (S.D.N.Y. 1956), aff'd *sub nom. United States v. Sheba Bracelets*, 248 F.2d 134 (2d Cir. 1957), cert. denied, 355 U.S. 904 13
United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 14
United States v. Heinze, 361 F.Supp. 46 (D. Del. 1973) 11
United States v. Hirsch, 100 U.S. 33 (1879) 11, 14
United States v. Klein, 247 F.2d 908 (2 Cir. 1957), cert. denied, 355 U.S. 924 (1958).....9, 12
United States v. McElvain, 272 U.S. 633 (1926).....10, 11
United States v. Rabinowich, 238 U.S. 78 (1915)..... 11
United States v. St. Louis Dairy Co., 79 F.Supp. 12 (E. D. Mo. 1948), rev'd *sub nom. Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949), cert. denied, 339 U.S. 942 (1950) 13
United States v. Scharton, 285 U.S. 518 (1932) 11
United States v. Tager, 479 F.2d 120 (10th Cir. 1973), cert. denied, 94 S.Ct. 924 (1974) 9
United States v. Vazquez, 319 F.2d 381 (3d Cir. 1963) 11
United States v. Waldin, 253 F.2d 551 (3d Cir. 1958), cert. denied, 356 U.S. 973 10
United States v. Witt, 215 F.2d 580 (2d Cir. 1954), cert. denied, 348 U.S. 887 9

Page

CONSTITUTIONAL PROVISION:

United States Constitution, Amendment V. 3, 4

STATUTES:

18 U.S.C. §371 (1970) 2, 3, 5, 9, 10, 11, 12

18 U.S.C. §3231 (1970) 6

18 U.S.C. §3282 (1970) 2, 4, 9, 11

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 6531 .....4, 11
Sec. 6531(1) 2, 4, 9, 10, 11
Sec. 6531(2) 4, 11
Sec. 6531(8) 4, 11
Sec. 7201 11
Sec. 7206(1) 5, 6
Sec. 7214(a)(4) 10

28 U.S.C. §1254(1) (1970) 2

MISCELLANEOUS:

Note, *Developments in the Law-Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

W. HORACE LOWDER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

W. Horace Lowder petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on February 22, 1974.

OPINION BELOW

The district court did not deliver any opinion in rendering its judgment. The opinion delivered by the court of appeals has been reported at 492 F.2d 953, and has been unofficially reported at 74-1 U.S.T.C. ¶9258 and at 33 A.F.T.R. 2d ¶74-472; it is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1974. Petitioner, who until then had acted *pro se,* retained counsel and petitioned for rehearing. The court of appeals denied the petition by order filed on March 15, 1974. By order dated April 3, 1974, Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari in this cause to and including May 14, 1974. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Petitioner was convicted on one count of conspiracy to defraud the United States of America and on two counts of knowingly filing false corporate income tax returns. The conspiracy count charged eighteen overt acts in furtherance of the alleged conspiracy. The most recent of these occurred approximately five years and seven months before the date of the indictment. The first question presented for review is whether the conspiracy count, 18 U.S.C. § 371, is governed by the five-year statute of limitations provided in 18 U.S.C. § 3282, or the six-year statute provided in Section 6531(1), Internal Revenue Code of 1954. If the five-year period is applicable, so that indictment on conspiracy was barred, the subsidiary question arises whether the evidence, arguments, and instructions on the conspiracy count may have influenced the convictions on the other counts.

2. The second question presented for review also pertains to the conspiracy count. The conspiracy was alleged to have been among petitioner and six corporations that he controlled. Petitioner was the only human allegedly involved. The second question is

whether the crime of conspiracy requires the unlawful combination of at least two natural persons, the conspiratorial agreement of at least two minds. If so, then there was no conspiracy, and the same subsidiary question arises, whether the conspiracy count influenced the convictions on the other counts.

3. The second count involved an allegedly false federal corporate income tax return for a fiscal year ending May 31, 1965. The evidence presented by the United States on this count consisted principally of a net worth computation indicating a substantial understatement of income for the fiscal year. This computation was *not* made by determining the actual net worth at the beginning and end of the fiscal year. Instead it was made by adding seven-twelfths of the increase in net worth for the calendar year 1964 to five-twelfths of the increase in net worth for the calendar year 1965. The third question presented for review is whether such an interpolation of net worth is proper in a criminal case. If not, a subsidiary question arises as to the influence of the error on the convictions on the other two counts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * * *

United States Code, Title 18:

§*371. Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency

thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§*3282. Offenses not capital.*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Internal Revenue Code of 1954 (26 U.S.C.):

§*6531. Periods of limitation on criminal prosecutions.*

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

* * *

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the

object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof. * * * *

§7206. *Fraud and false statements.*

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

1. PROCEEDINGS BELOW

On October 8, 1971, a grand jury returned an indictment in the United States District Court for the Middle District of North Carolina. Count I charged that petitioner W. Horace Lowder (hereinafter sometimes referred to as "Lowder") and six corporations

> and other persons whose names are to the grand jury unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury unknown, to defraud the United States of America by impeding, impairing, and obstructing the lawful functions of the Internal Revenue Service * * * in the ascertainment, computation, assessment and collection of revenue * * * * In violation of Title 18, U.S.C., Section 371.

The indictment charged eighteen overt acts in furtherance of the conspiracy, all consisting of the filing of federal corporate income tax returns. Count I did not allege that any of these returns were false, nor did it allege that the object of the conspiracy was to evade or defeat tax.

Counts II and III charged Lowder with knowingly filing false corporate income tax returns for one of the six corporations, All Star Hatcheries, Inc. (hereinafter referred to as "Hatcheries") for its taxable years ending May 31, 1965, and May 31, 1966, respectively, in violation of Section 7206(1), Internal Revenue Code of 1954.

Lowder was tried before a jury in January, 1973, on Counts I, II, and III and found guilty on all three counts. The district court had jurisdiction under 18 U.S.C. § 3231. The corporate defendants had been severed prior to trial and charges against them were dismissed.

On January 23, 1973, Lowder was sentenced to two year's imprisonment and a $10,000 fine on Count I; to two year's imprisonment and a $5,000 fine on Count II; and to two year's imprisonment and a $5,000 fine on Count III. The prison sentences were made to run concurrently.

Notice of appeal was filed on January 23, 1973. The United States Court of Appeals for the Fourth Circuit affirmed on February 22, 1974, declining to hear oral argument.

Lowder, who is not an attorney, had retained counsel at the arraignment. But he acted *pro se* at the trial and on appeal. When the court of appeals

affirmed, Lowder retained counsel and petitioned for rehearing. The petition was denied without opinion by order dated March 15, 1974.

2. PERIOD OF LIMITATIONS

The last overt act specifically charged in Count I of the indictment was the filing of a corporate income tax return on March 14, 1966, about five years and seven months before the date of the indictment, October 8, 1971. The district court ruled that the statute of limitations applicable to the conspiracy count was six years, rather than five years, and the Fourth Circuit agreed.

3. SOLE HUMAN CONSPIRATOR

The six corporations named as co-conspirators were engaged in different phases of feed, chicken, and egg production in North Carolina. Each was on a different taxable year. The government introduced evidence to show that near the end of each corporation's year, it paid out large amounts to the other corporations, reporting the bulk of the amounts so paid as deductible expenses.

The government also introduced evidence purporting to show taxable income in excess of that reported, relying heavily on a computation showing increases in the combined net worth of the corporations over the period 1962 through 1965. Despite the fact that the corporations were on different taxable years, the combined net worth computation was prepared on the basis of calendar years.

Throughout the period of time relevant to this case Lowder was the active manager of the affairs of each of the six corporations. He was in charge of book-

keeping for each corporation and signed each of the corporate income tax returns. The six corporations were privately owned family corporations. Lowder owned stock in each. The other stockholders gave him a free hand in decision making. From the record as a whole it is clear that Lowder was the only *natural* person involved in the alleged conspiracy.

The district court instructed the jury in pertinent part as follows:

> In the present case you will note that one human defendant, one human individual defendant, is charged with conspiring with or on behalf of one or more corporations. I charge you that a corporation can conspire with a human being or another corporation just as one human being can conspire with another human being. The fact that a corporation can act only by human agents is immaterial. It may happen that an individual, let us say Mr. Doe is an officer of Y company and is also an officer of Z company, and it may happen that when Mr. Doe, the officer, acts, he acts both for Y company and Z company or for Y or Z company and his own account. If this situation does exist, then it is possible to find a conspiracy, because Mr. Doe is acting in a dual role and he is, in contemplation of law, two persons.

4. INTERPOLATION OF NET WORTH

Count II charged Lowder with knowingly filing a false income tax return for Hatcheries for its fiscal year ending May 31, 1965. That return reported taxable income of $39,815.44, before taking into account a net operating loss carryover. The government's only evidence that this return was false was a computation of Hatcheries' increase in net worth during the year ending May 31, 1965, which purported to show an increase in net worth of $151,372.44.

This computation was extracted from the net worth computation for the calendar years 1962 through 1965 that was offered into evidence on Count I. The calendar year net worth computation showed an increase of $20,071.74 in Hatcheries' net worth during the calendar year 1964, and an increase of $335,193.42 in Hatcheries' net worth during the calendar year 1965. The government's witness then assumed that each year's increase in net worth occurred ratably over the year, with each month accounting for one-twelfth of the increase for the year. He computed the $151,372.44 increase in net worth for the year ending May 31, 1965, by adding seven-twelfths of the calendar 1964 increase in net worth to five-twelfths of the calendar 1965 increase.

REASONS FOR GRANTING THE WRIT

1. PERIOD OF LIMITATIONS

Lowder was charged with conspiracy in violation of the general criminal conspiracy statute, 18 U.S.C. § 371. The Fourth Circuit held that the applicable period of limitations was not the five-year period provided in 18 U.S.C. § 3282, but the six-year period provided in Section 6531(1), Internal Revenue Code of 1954 (hereinafter "Internal Revenue Code").

The Fourth Circuit's decision conflicts with a holding of this Court; with two holdings of the Second Circuit; and with dictum of the Tenth Circuit. *Grunewald v. United States,* 353 U.S. 391, 396 (1957) (holding); *United States v. Klein,* 247 F.2d 908, 912 (2 Cir. 1957) (holding), cert. denied, 355 U.S. 924 (1958); *United States v. Witt,* 215 F.2d 580, 584 (2d Cir. 1954) (holding), cert. denied, 348 U.S. 887; *United States v. Tager,* 479 F.2d 120, 121 (10th Cir. 1973) (dictum), cert. denied, 94 S.Ct. 924 (1974).

The essence of the government's case and the great bulk of the evidence dealt with the conspiracy count, the alleged violation of 18 U.S.C. §371. The Fourth Circuit upheld the conviction on the theory that the entire indictment was timely under the six-year statute of limitations in Section 6531(1) of the Internal Revenue Code. However, by its terms, Section 6531(1) applies only to "offenses *arising under* the internal revenue laws." (Emphasis added.) "A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object." *Braverman v. United States*, 317 U.S. 49, 54 (1942). Accordingly, Section 6531(1) can apply only where the conspiracy is itself a violation of the internal revenue laws. For example, a violation of Section 7214(a)(4) of the Internal Revenue Code is an offense arising under the internal revenue laws. Section 7214(a)(4) provides that "Any officer or employee of the United States acting in connection with any revenue law of the United States * * * who *conspires* or colludes with any other person to defraud the United States * * * shall be fined * * * or imprisoned * * * or both."(Emphasis added.) Thus, Section 6531(1) would clearly apply to such a conspiracy. *E.g., United States v. Waldin*, 253 F.2d 551, 558 (3d Cir. 1958) (INT. REV. CODE of 1939), cert. denied, 356 U.S. 973, where what is now Section 6531(1) was held applicable to a conspiracy violating what is now Section 7214(a)(4), Internal Revenue Code.

But the charge against Lowder was conspiracy in violation of 18 U.S.C. §371, which is not an offense "arising" under the internal revenue laws. *United States v. McElvain*, 272 U.S. 633, 638 (1926); *United*

States v. Hirsch, 100 U.S. 33, 35 (1879); accord, *United States v. Rabinowich,* 238 U.S. 78 (1915). Lowder was not even charged with conspiracy to commit offenses arising under the internal revenue laws. Instead he was charged under the second clause of 18 U.S.C. § 371 with conspiring to defraud the United States, a charge that is in no way dependent upon any violation of the internal revenue laws. See *United States v. McElvain, supra,* 272 U.S. at 639; *United States v. Vazquez,* 319 F.2d 381, 384 (3d Cir. 1963). Since Count I did not charge Lowder with an offense arising under the internal revenue laws, the six-year statute of Section 6531(1) of the Internal Revenue Code cannot apply. The five-year statute of limitations provided by 18 U.S.C. § 3282 is therefore applicable.

This conclusion is reinforced by an examination of Section 6531(8) of the Internal Revenue Code, which provides a six-year statute of limitations for "offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof," *i.e.,* where the object of the conspiracy constitutes the substantive offense defined by Section 7201 of the Internal Revenue Code.[1] By clear implication, Section 6531 of the Internal Revenue Code can have no application to other conspiracies in violation of 18 U.S.C. § 371, such as Lowder was charged with. Compare §6531(1) with §6531(2), Internal Revenue Code; see *United States v. Scharton,* 285 U.S. 518 (1932); *United States v. Heinze,* 361

[1] "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall * * * be guilty of a felony * * *"

F. Supp. 46, 54 (D. Del. 1973); but see *Braverman v. United States, supra,* 317 U.S. at 54-55.

The Fourth Circuit frankly acknowledged that its decision conflicts with this Court's holding in *Grunewald* and the Second Circuit's in *Klein*:

> The government argues that the language in both cases represents not holding, but dicta, since the precise issue here was not contested by the parties. Especially in *Grunewald,* we do not think that the language was dicta. On the other hand, the language was not part of the main holdings in either case; it was not with respect to any issue which was fully briefed and pressed; and it seems nothing more than mere inadvertence on the part of both courts that the specific language of § 6351 [*sic*], and its predecessors, was overlooked. We, therefore, conclude to follow the specific statutory language, rather than the contrary statements in *Grunewald* and *Klein* and hold that the applicable limitation period was six years. [*Infra* at 6a-7a, 492, 492 F.2d at 956.]

It is clear that the Fourth Circuit, at the very least, erred in concluding that this Court in *Grunewald* and the Second Circuit in *Klein* merely overlooked the possible applicability of the statute of limitations in Section 6531 of the Internal Revenue Code. The question has great practical consequences, since it determines whether an indictment will be returned at all. The government has already begun to rely on the opinion below.[2] Therefore, the potential for creating

[2] Petitioner's counsel have been advised that the government is relying on the Fourth Circuit's opinion in this case in *United States v. Fruehauf Corp.*, Criminal Action No. 45325, a case involving the same issue and now pending in the United States District Court for the Eastern District of Michigan, Southern Division.

further conflicts is real and imminent and can best be prevented by a grant of certiorari in this case.

2. SOLE HUMAN CONSPIRATOR

The Fourth Circuit's discussion on the conspiracy count was confined to the question of the period of limitations. But even without recourse to the record, it is clear from the Fourth Circuit's opinion that Lowder was the only human involved. The decision of the Fourth Circuit thus represents an implied holding that the crime of conspiracy can be committed by one human in combination with corporations he controls; and the district court gave an express instruction to the jury to this effect. This conflicts with *Union Pacific Coal Co. v. United States,* 173 Fed. 737, 744-45 (8th Cir. 1909), where the Eighth Circuit expressly considered the question, and held that because an essential element of the crime of conspiracy is an agreement between at least two minds, more than one human must be involved. The same conclusion was reached independently in *United States v. Carroll,* 144 F.Supp. 939 (S.D.N.Y. 1956), aff'd on other issues *sub nom. United States v. Sheba Bracelets,* 248 F.2d 134 (2d Cir. 1957), cert. denied, 355 U.S. 904. See Note, *Developments in the Law-Criminal Conspiracy,* 72 HARV. L. REV. 920, 951-53 (1959). Neither of these express holdings appears to have come to the attention of the courts below, perhaps because Lowder acted *pro se.*[3]

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[3] The government's briefs below cited neither *Union Pacific Coal* nor *Carroll.* The government cited *United States v. St. Louis Dairy Co.,* 79 F.Supp. 12 (E.D. Mo. 1948) as bearing on the point, but failed to cite its reversal *sub nom. Pevely Dairy Co. v. United States,* 178 F.2d 363 (8th Cir. 1949), cert. denied, 339 U.S. 942 (1950). The case on which the jury instruction in the district

Due process requires that each element of a crime be proven. *Thompson v. City of Louisville*, 362 U.S. 199 (1960). An essential element of the crime of conspiracy is "the combination of minds in an unlawful purpose * * *" *United States v. Hirsch*, 100 U.S. 33, 34 (1879). "For it is the collective planning of criminal conduct at which the statute aims." *Gebardi v. United States*, 287 U.S. 112, 121 (1932). Lowder's conviction without any evidence of this element is plain error which this Court may in its discretion and should correct. *Clyatt v. United States*, 197 U.S. 207 (1905); see *Silber v. United States*, 370 U.S. 717 (1962). But if the conspiracy count is held to be barred by the statute of limitations, it will not be necessary to reach this question.[4]

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court below appears to have been based is to be distinguished since it was a civil antitrust case: *Cape Cod Food Products, Inc. v. National Cranberry Ass'n*, 119 F.Supp. 900, 909 (D. Mass. 1954). All of the other cases cited by the government are to be similarly distinguished, or are obiter dicta: *Alamo Fence Co. v. United States*, 240 F.2d 179 (5th Cir. 1957); *American Medical Ass'n v. United States*, 130 F.2d 233, 252-53 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943); *United States v. General Motors Corp.*, 121 F.2d 376, 411 (7th Cir. 1941), cert. denied, 314 U.S. 618; *Joplin Mercantile Co. v. United States*, 213 Fed. 926 (8th Cir. 1914), aff'd, 236 U.S. 531 (1915).

[4] If the conspiracy count is reversed on either ground, a new trial will be necessary on the other counts. The evidence introduced solely on the conspiracy count and the perjorative effect of the term "conspiracy" itself may have influenced the jury's verdicts on the other two counts. This was prejudicial error if the conspiracy count was not properly before the jury. Cf. *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Bentvena*, 319 F.2d 916, 955 (2d Cir. 1963) ("concurring" majority opinion), cert. denied, 375 U.S. 940; but cf. *Schaeffer v. United States*, 362 U.S. 511 (1960). This means that the concurrent sentences do not moot any of the questions presented herein. See *Smith v. United States*, 335 F.2d 270 (D.C. Cir. 1964). Note also that separate fines were imposed on each of the three counts; and see *Benton* v. *Maryland*, 395 U.S. 784, 787-91 (1969).

3. INTERPOLATION OF NET WORTH

The Fourth Circuit's decision squarely approves the government's use of a net worth computation that was not based on Hatcheries' actual opening and closing net worth for the taxable year in issue. The government did not determine net worth as of May 31, 1964, and May 31, 1965, the beginning and end of the taxable year at issue in Count II. Instead, the government determined net worth as of December 31, 1963, December 31, 1964, and December 31, 1965, and *assumed* that increases in net worth accrued ratably during each calendar year. Yet the entire increase in net worth for calendar year 1965 may have occurred during the last seven months of the year. This method is in conflict with the principle stated by this Court that "an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth to serve as a starting point from which to calculate future increases in the taxpayer's assets." *Holland v. United States,* 348 U.S. 121, 132 (1954). In two lower court cases involving civil fraud, where the government's burden was less than it is here, the courts rejected analogous methods of ratable allocation over a period of time. *Ehlers v. Vinal,* 253 F.Supp. 58, 67-68 (D. Neb. 1966), aff'd on other issues, 382 F.2d 58 (8th Cir. 1967); *W. A. Shaw,* 27 T.C. 561, 570 (1956), aff'd on other issues, 252 F.2d 681 (6th Cir. 1958).

In the two decades since *Holland* the use of the net worth method has become increasingly more common and complex in criminal tax cases. Further guidance from this Court as to the permissible boundaries on the use of this method would be appropriate.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1176

UNITED STATES OF AMERICA, *Appellee,*

v.

W. HORACE LOWDER, *Appellant.*

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, Chief Judge.

Submitted December 28, 1973 Decided: February 22, 1974

Before WINTER, CRAVEN, and BUTZNER, Circuit Judges.

Scott P. Crampton, Assistant Attorney General, United States Department of Justice, and Meyer Rothwacks, John P. Burke, Robert L. Baker, Richard P. Slivka, Attorneys, United States Department of Justice, on brief for the Appellee. W. Horace Lowder, Appellant pro se.

PER CURIAM:

W. Horace Lowder was convicted in January, 1973, in a trial by jury, of one count of conspiracy to defraud the United States by obstructing the Internal Revenue Service in its task of computing and collecting revenue (18 U.S.C. § 371) and two counts of knowingly filing false corporate income tax returns (26 U.S.C. § 7206(1)). Lowder was sentenced to two years' imprisonment on each count and was fined $10,000 on the conspiracy count and $5,000 on each of the other two counts.

The government's case was based on the theory that Lowder utilized his intimate connection with six family-owned corporations to foster an intricate scheme whereby their tax liability would be obscured and evaded, in the years 1961-65. The basic facts as to those years for each corporation follow:

(1) *All Star Mills, Inc.* (*Mills*): The original family corporation, founded in 1932 by Lowder's father; principal business was sale of flour and animal feed; Lowder's ownership 11½%. There were 26 other stockholders.

(2) *Lowder Farms, Inc.* (*Farms*): A second family-owned corporation, founded in 1950 by Lowder's father and uncle; principal business of beef cattle and farming; Lowder's ownership 11½%. There were 24 other stockholders.

(3) *All Star Hatcheries, Inc.* (*Hatcheries*): Founded in 1959 by Lowder for the business of hatching and growing poultry (broilers); Lowder and wife owned 100% of stock.

(4) *All Star Foods, Inc.* (*Foods*): Founded in 1959 by Lowder to raise layers and produce and market eggs; Lowder owned 51% through stock held by him and Hatcheries. Mills owned 49%.

(5), (6) *All Star Industries, Inc.*, and *Consolidated Industries, Inc.*, were both named as co-conspirators but their activities did not play any significant role. The former was formed in 1961 to hold a mortgage on property owned by Foods; the latter was formed to be the legal owner of a farm. Lowder owned 100% of the former, 33⅓% of the latter.

Lowder throughout the relevant years was the active manager of the affairs of each corporation. He held, among others, the position of secretary-treasurer in each, was in charge of the overall business and financial operations for all, including bookeeping, and signed each of the corporate tax returns. That Lowder was responsible for the practices alleged to have constituted a scheme to cover up tax liability

was not disputed by him; the other shareholders and officers apparently gave him a free hand in decision-making.

The four active corporations were Mills, Farms, Foods, and Hatcheries, all of whose books and records were kept in the offices of the original company, Mills. Almost all of the paper work—handling sales invoices, posting accounts, etc. —was handled by Mills' employees.

In addition to regular business with third parties, these four corporations, along with the two inactive ones, engaged in a substantial number of inter-corporate transactions. Their records over the four-year period showed that some $17 million was transferred by checks running from each corporation to the five others; that some $5 million of this amount was attributable to loans extended or loans repaid; and that the remaining $12 million was reflected as expenses on the books of the paying corporations. The nature and validity of these expensed transfers—whether the amounts represented transactions in real goods and services or whether they were mere transfers of money fraudulently treated as "expenses" to avoid a showing of profits—was the crux of the case before the jury.

The major contentions advanced by Lowder are: (1) conviction on the first count was barred by the statute of limitations, 18 U.S.C. § 3282; (2) the employment of a net worth method in count two was erroneous; (3) the convictions on each count rested on insufficient evidence. For the major portion of the proceedings in the district court and before us, Lowder represented himself. There is no claim that his lack of counsel was the result of indigency. In January, 1972, three months after his indictment and one year before the trial, Lowder discharged his retained attorney over a fee dispute. The legal and factual complexity of the charges have made his chosen course hazardous, but we have endeavored to scrutinize the record and give the assigned errors full consideration. We decline, however, to hear argument *pro se*.

COUNT I

The conspiracy conviction is assailed as barred by the applicable statute of limitations. We do not agree and, therefore, we affirm.

Lowder and the six corporations were charged with conspiring, from January, 1961, up through the date of the indictment, October 8, 1971, to defraud the United States "by impeding, impairing and obstructing the lawful functions of the Internal Revenue Service, . . . in the ascertainment, computation, assessment and collection of revenue" from the four active corporations.

As alleged and proved the essence of the government's case was that: (1) each corporation had a different accounting year—Mills was on a calendar year basis and the other five were each on different fiscal years; (2) the transfers of money, ostensibly paid for supplies such as feed, would usually occur in large amounts towards the close of the fiscal year for the transferor/"purchaser"; (3) these transfers, treated as expenses, would in virtually every instance wipe out then-existing profits which had been accumulating to the transferor during its taxable year; (4) the "seller"/transferee would in turn eliminate the effect these amounts had on its books as receipts (and potential profits) when its taxable year closed a few months later by another transfer similarly expensed, and so on, in a process denoted as "rolling" by the investigating agent; (5) the transfers of money, in the aggregate, overstated the value of the goods actually changing hands, i.e., Mills did sell feed to Hatcheries, but not nearly in the quantities which would justify the amounts expensed on the books; (6) the fact that Mills and Farms were on an accrual basis method of accounting and Hatcheries and Foods were on a cash basis method was utilized by Lowder to obscure the real transactions; and (7) the underlying documents—invoices, ledger cards, etc.—against which the validity of these transfers could

have been checked were deliberately destroyed or concealed.

Of the eighteen alleged overt acts, all of which were corporate income tax filings for the years in question, the latest occurred on *March 14, 1966,* the date of the filing of Mills' return for the previous calendar year. The date of the indictment is *October 8, 1971,* approximately five years and seven months after the date of the last overt act alleged therein.

Before the trial, the court ruled that the six-year statute of limitations specified in 26 U.S.C. § 6531(a) applied to the conspiracy count as well as to the fraudulent filing charges. Lowder asserts that the first count, charging a conspiracy to defraud under 18 U.S.C. § 371, was governed by the general five-year limitation period specified in 18 U.S.C. § 3282,[1] but we think the six-year limitation period in 26 U.S.C. § 6531 governs. The general conspiracy statute, 18 U.S.C. § 371, contains no period of limitations. Limitations, for indictments under § 371, are those supplied by other provisions of law, or where there are none, by 18 U.S.C. § 3282 which is a general statute of limitations applicable "[e]xcept as otherwise expressly provided by law." Thus, § 3282 applies where no other statute is applicable, and, stated conversely, its application is ousted when there is a special limitation period prescribed for a specific offense.

In the case of prosecutions of violations of the tax laws, 26 U.S.C. § 6531 provides, in relevant part:

> No person shall be prosecuted . . . for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted

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[1] Section 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted . . . for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

within 3 years next after the commission of the offense, except that *the period of limitation shall be 6 years*—

(1) *for offenses involving the defrauding* or attempting to defraud *the United States* or any agency thereof, *whether by conspiracy or not,* and in any manner. . . .

It thus appears that for a conspiracy to defraud the United States by filing false and fraudulent tax returns—the crime charged against Lowder, § 6531 prescribes a six-year period of limitations and, as part of the overall statutory scheme, § 3282, by its terms, is inapplicable.

Two authorities do apparently stand opposed to what seems to be this fairly obvious statutory scheme: Grunewald v. United States, 353 U.S. 391 (1957); and United States v. Klein, 247 F.2d 908 (2 Cir. 1957), cert. denied, 355 U.S. 924 (1958).

In *Klein,* on an indictment charging a § 371 conspiracy to defraud in language virtually identical to that contained in count one here, the court, as a preclude to its discussion of the evidence showing the period that the conspiracy continued, stated that 18 U.S.C. § 3282 was applicable. In *Grunewald,* on an indictment charging a conspiracy " 'to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws' " the Court stated that the "first question before us is whether [the § 371 count] was barred by the applicable three-year statute of limitations.[8] " 353 U.S. at 396. The footnote was to § 3282 (amended in 1954 to provide for the present five-year period).

The government argues that the language in both cases represents not holding, but dicta, since the precise issue here was not contested by the parties. Especially in *Grunewald,* we do not think that the language was dicta. On the other hand, the language was not part of the main holdings in either case; it was not with respect to any issue which was fully briefed and pressed; and it seems nothing more than mere inadvertence on the part of both courts that the

specific language of § 6351 [*sic*], and its predecessors, was overlooked. We, therefore, conclude to follow the specific statutory language rather than the contrary statements in *Grunewald* and *Klein* and hold that the applicable limitation period was six years. The prosecution against Lowder on count one was not barred.

COUNT II

Lowder was convicted on count two of knowingly subscribing to a false income tax return. 26 U.S.C. § 7206(1). The corporate tax return for Hatcheries for the fiscal year ending May 31, 1965, reported taxable income, before net operating loss deduction and special deductions, of $39,815.44. The government charged that the figure was deliberately and substantially understated.

The government offered a computation showing the increased net worth of Hatcheries for that fiscal year in order to establish the substantiality of the understatement. The computation for Hatcheries for that year was derived from a more extensive net worth computation which embraced all six corporations over the 1961-65 four-year period on a calendar year basis. The latter showed a total unreported taxable income in excess of $1.5 million for all corporations over the period with a resulting estimated unreported tax liability of over $400,000.

From the four-year (calendar-year basis) net worth computation, the government's expert witness extracted the computation of net worth increases over that period for Hatcheries alone. Since the increases for Hatcheries were still on a calendar-year basis, they were then converted by monthly pro-ration to reflect fiscal year increases as of each May 31st, Hatcheries' closing date. Thus, for the fiscal year ending May 31, 1965, 7/12ths of the 1964 net worth increase was added to 5/12ths of the 1965 net worth increase to arrive at a 12-month fiscal year net worth increase of $151,372.44. Since Hatcheries' return reported taxable income of $39,815.44, the computation reflected additional

taxable income for the fiscal year ending May 31, 1965, of $111,557.00.

Having examined the exhibits and retraced the computations, we cannot accept Lowder's claim that this derivation should not have been admissible as proof of understatement. As we understand his brief, his objection amounts to a claim that the government cannot cut through the complexity of the apparent scheme to the substance of corporations' financial activities. The net worth method was most appropriate in this case where the gross figures appearing on the books and transferred to the tax returns were suspect and the underlying documentation was unavailable. See Johnson v. United States, 325 F.2d 709 (1 Cir. 1963). More specifically, since utilization of the different fiscal year dates was apparently an integral part of the scheme to "roll" income to avoid taxation, we think the government was properly allowed to pierce the surface by its pro-rata derivation. Holland v. United States, 348 U.S. 121, 131 (1954).

Lowder also attacks the conviction on count two on the additional ground of insufficient evidence. That the taxable income was properly shown to have been understated is already settled. Lowder signed the return. As to the requisite criminal intent, the jury may of course infer that from circumstantial evidence. United States v. Barnes, 313 F.2d 325 (5 Cir. 1963). Such a basis existed, to cite but one example, in Lowder's failure to produce verifying documents for large expense items on Hatcheries' books for the instant year, at times in 1966 when, according to other testimony, the documents should have been in the corporate offices.

Construing the evidence most favorably for the government, we find it was sufficient to permit the jury to adjudge Lowder guilty beyond a reasonable doubt. Bell v. United States, 185 F.2d 302 (4 Cir. 1950), cert. denied, 340 U.S. 930 (1951). The conviction on count two must therefore stand.

COUNT III

The conviction on count three was also for knowingly filing a false return under 26 U.S.C. § 7206(1). The government charged that, as to Hatcheries' tax return for the fiscal year ending May 31, 1966, Lowder deliberately failed to report $33,704.28 of taxable income as represented by three checks: (1) two checks from Foods to Hatcheries, dated December 30, 1965, totaling $32,519.28, which amount the government showed was expensed at that time on Foods' books; (2) one check from Farms to Hatcheries dated November 29, 1965, in the amount of $1,185.00, which amount was expensed at that time on Farms' books.

The only objection raised by Lowder is that the evidence was insufficient. He claims that the government failed to show any actual loss of revenue since, by his version, the Foods checks had been mislaid from the dates of making until February, 1967, at which time they were recorded on Hatcheries' books and computed in the income for that next fiscal year. But what Lowder might have done in subsequent years was irrelevant to whether he filed the return for the instant fiscal year knowing that those checks should have been reported as income to Hatcheries. The jury evidently did not believe his story, and we cannot say that they were unwarranted in so doing. That checks totaling over $33,000—money which at least could have been earning interest—were mislaid for fourteen months, and turned up after the IRS agent had begun his investigation, was sufficient to support the verdict on the element of intent. Bell v. United States, supra.

Lowder's miscellaneous assignments of error, which he merely listed without discussion in his brief, have been considered. They do not warrant discussion and are devoid of merit.

For the reasons stated, the convictions on each count are affirmed.

AFFIRMED.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	16

CITATIONS

Cases:

Braverman v. *United States*, 317 U.S. 49	11
Cape Cod Food Products v. *National Cranberry Ass'n*, 119 F. Supp. 900	14
Direct Sales Co. v. *United States*, 319 U.S. 703	13
Duignan v. *United States*, 274 U.S. 195	13
Falter v. *United States*, 23 F. 2d 420	11
Grunewald v. *United States*, 353 U.S. 391	6
Husty v. *United States*, 282 U.S. 694	13
Kotteakos v. *United States*, 328 U.S. 750	12
Lawn v. *United States*, 355 U.S. 339	13
Nelson Radio & Supply Co. v. *Motorola*, 200 F. 2d 911	13
Poller v. *Columbia Broadcasting*, 368 U.S. 464	13
Schaffer v. *United States*, 362 U.S. 511	12
Union Pacific Coal Co. v. *United States*, 173 Fed. 737	13
United Brotherhood of Carpenters v. *United States*, 330 U.S. 395	13
United States v. *Bentvena*, 319 F. 2d 916	12
United States v. *Carroll*, 144 F. Supp. 939, affirmed on other issues *sub nom. United States* v. *Sheba Bracelets*, 248 F. 2d 134, certiorari denied, 355 U.S. 904	13
United States v. *Grainger*, 346 U.S. 235	11
United States v. *Klein*, 247 F. 2d 908, certiorari denied, 355 U.S. 924	6
United States v. *McElvain*, 272 U.S. 633	7, 8, 9, 10, 11
United States v. *Scharton*, 285 U.S. 518	8

559-188—74——1

Cases—Continued

	Page
United States v. *Witt*, 215 F. 2d 580, certiorari denied *sub nom. Talanker* v. *United States*, 348 U.S. 887	6

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 6531	2, 5, 7, 9
Sec. 6531(1)	2, 4, 6, 7, 8, 9, 10, 11
Sec. 6531(2)	8
Sec. 6531(3)	8
Sec. 6531(7)	8
Sec. 6531(8)	6, 8
Sec. 7201	6, 8
Sec. 7206(1)	2, 3
Sec. 7214(a)	8
Sec. 7214(a)(4)	8
Revenue Act of 1924, 43 Stat. 253, 341, Sec. 1010(a)	10
Revised Statutes, Sec. 1044	9, 10
18 U.S.C. 371	2
18 U.S.C. 3282	2, 4, 5, 6, 7, 8

Miscellaneous:

H. Conf. Rep. No. 1492, 72d Cong., 1st Sess.	8
Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959)	13

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1702

W. HORACE LOWDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render a written opinion. The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 492 F.2d 953.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1974. A timely petition for rehearing was denied on March 15, 1974. By order dated April 3, 1974, Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to

and including May 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conspiracy to defraud the United States in violation of 18 U.S.C. 371 by impeding and obstructing the functions of the Internal Revenue Service in ascertaining and collecting income taxes is governed by the five-year statute of limitations of 18 U.S.C. 3282 or the six-year statute of limitations provided by 26 U.S.C. 6531(1).

2. Whether such a conspiracy existed between petitioner and six corporations controlled by him, where he was the sole human being involved in planning the fraudulent shifting of income among the corporations.

3. Whether the net worth method of computing understatements of income was properly applied in this case.

STATUTES INVOLVED

The pertinent provisions of 18 U.S.C. 371 and 3282, and 26 U.S.C. 6531 and 7206(1), are set forth at pp. 3–5 of the petition.

STATEMENT

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of (1) willfully conspiring with six family corporations to defraud the United States by impeding and obstructing the functions of the Internal Revenue Service in ascertaining and collecting the income taxes of the corporations for certain fiscal years between 1961 and 1965, in violation of 18 U.S.C. 371; and (2) willfully making and signing the

corporate income tax returns of All Star Hatcheries, Inc. (one of the six corporations), for its taxable years ended May 31, 1965, and May 31, 1966, which he did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1) (two counts). Petitioner was sentenced to concurrent two-year prison terms on each of the three counts; he was fined $10,000 on the conspiracy count and $5,000 on each of the other counts.

The evidence showed that petitioner utilized his intimate connection with six family-owned corporations [1] to foster a scheme whereby their tax liability would be evaded. Petitioner was the active manager of the affairs of each corporation, was in charge of the overall business and financial operations for all, including bookkeeping, and signed each of the corporate tax returns. He did not dispute that he was responsible for the practices alleged to have constituted a scheme to cover up the tax liability of the corporations. These practices consisted mainly of engaging in substantial numbers of inter-corporate transactions. During one four-year period approximately $17 million was transferred by checks running from each corporation at the end of its respective taxable year to one of the five others, the taxable year of which terminated at a later time; some $5 million of this amount was attributable to loans extended or loans repaid, and the remaining $12 million was reflected as

[1] All Star Mills, Inc., Lowder Farms, Inc., All Star Hatcheries, Inc., All Star Foods, Inc., All Star Industries, Inc., and Consolidated Industries, Inc.

expenses on the books of the paying corporations. The government's proof showed that these amounts were mere transfers of money, fraudulently treated as deductible expenses for goods and services to avoid reporting a profit.

ARGUMENT

1. The principal question raised by the petition (Pet. 9–13) is whether prosecution of the conspiracy count was barred by the five-year statute of limitations of 18 U.S.C. 3282 or was timely under the six-year statute prescribed by 26 U.S.C. 6531(1). The former provision states: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

However, Section 6531(1) provides that "[n]o person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner." Because the last of the 18 overt acts (all of which were corporate income tax return filings) alleged in the conspiracy count occurred on March 14, 1966, petitioner contends that his indictment on October 8, 1971, was

barred by the five-year statute of limitations of 18 U.S.C. 3282.[2]

As we show in the ensuing discussion, the issue involves the interpretation of various decisions of this Court rendered between 25 and 50 years ago and is not entirely free from doubt. Although the court of appeals' opinion does not address itself to several of the precedents of this Court that we believe must be interpreted in reaching a resolution of the issue,[3] we believe the court was correct in reaching the result that the six-year period of limitations is applicable.

Moreover, we think that the issue (whether the applicable statute of limitations for a conspiracy to defraud the United States of taxes is five or six years) clearly is not sufficiently important at this time to warrant plenary review by this Court. Apart from the decision below, we have found no other reported opinion by a court of appeals dealing with the question. The Internal Revenue Service generally seeks to develop tax fraud conspiracy cases within the five-

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[2] With respect to the first substantive count (alleging the filing of a false corporate income tax return on August 14, 1965), the six-year statute of limitations was extended pursuant to 26 U.S.C. 6531 for an additional nine months by the filing of a complaint prior to August 13, 1971.

[3] Petitioner, a non-lawyer, appeared *pro se* in the courts below. Although he did raise the statute of limitations issue in the district court (Tr. 655) and in the court of appeals, he did not advance the specific statutory arguments set forth in the petition. Thus, while the government brought the authorities cited in the petition to the attention of the court of appeals, it is understandable that the court of appeals did not expressly deal with them in its opinion.

year period if possible, or, alternatively, charges a conspiracy to evade or defeat taxes (*i.e.*, to violate 26 U.S.C. 7201), which charge is clearly governed by the six-year period of limitations (26 U.S.C. 6531(8)). Thus, it is rare for an indictment to be brought respecting which this issue is pertinent. Moreover, there is relatively little at stake for this petitioner, since he received concurrent prison sentences on the conspiracy and the substantive counts, his only additional punishment for the conspiracy conviction being a fine of $10,000.

Accordingly, if this Court is not satisfied on the basis of the papers before it that the petition for certiorari should be denied, we believe it would be preferable to remand to the court of appeals for further consideration.

a. The court of appeals concluded (Pet. App. 5a–6a) that the six-year statute of limitations was applicable. Petitioner urges that the decision below is in conflict with *Grunewald* v. *United States*, 353 U.S. 391; *United States* v. *Klein*, 247 F. 2d 908, 912 (C.A. 2), certiorari denied, 355 U.S. 924; and *United States* v. *Witt*, 215 F. 2d 580, 584 (C.A. 2), certiorari denied *sub nom. Talanker* v. *United States*, 348 U.S. 887. In those cases, however, the applicability of the longer statute of limitations of 26 U.S.C. 6531(1) was not raised by the government. As a result, it was assumed that the governing statute of limitations was the shorter period of 18 U.S.C. 3282. Thus, those decisions cannot be said to conflict with this case, because the question as to which period of limitations was applicable was not presented or decided in those cases.

b. However, apart from the alleged conflict, petitioner presents a statutory argument in support of his claim that the five-year statute of limitations of 18 U.S.C. 3282 is applicable to the conspiracy count. Citing the prefatory language of Section 6531—"offenses arising under the internal revenue laws"—petitioner contends (Pet. 10–12) that Section 6531(1) governs only when the conspiracy is itself a violation of the internal revenue laws. Since he contends that the conspiracy charged, "to defraud the United States," did not "arise" under the internal revenue laws, petitioner urges that Section 6531 can have no application.

Although the matter is not entirely free from doubt, we believe that the decision of the court of appeals is correct. Its holding is supported by the language of Section 6531(1), which extends the six-year statute of limitations to "offenses involving the defrauding or attempting to defraud the United States or any agency thereof, *whether by conspiracy or not,* and in any manner" (emphasis supplied). If this statutory language were the only matter to be considered, the decision below would seem clearly correct, for petitioner's conspiracy offense falls squarely within the words of the provision.

However, some doubt is created regarding this reading of the pertinent statutory provisions by this Court's decision in *United States* v. *McElvain,* 272 U.S. 633, and by the structure of Section 6531, neither of which was dealt with in the opinion of the court of appeals.[4] As Section 6531 is now written, only

[4] See note 3, *supra.*

subsection (8) deals expressly with the period of limitations applicable to a conspiracy charge under 18 U.S.C. 371. It provides that the six-year period of limitations governs a conspiracy the object of which is to "attempt in any manner to evade or defeat any tax or the payment thereof"—*i.e.*, a conspiracy to violate 26 U.S.C. 7201.[5] Petitioner argues (Pet. 11) that this provision would be surplusage if subsection (1) were construed, as the government sought to do in *McElvain*, to encompass conspiracies to violate the tax laws, and accordingly the only tax conspiracy subject to the longer period of limitations of Section 6531 is a conspiracy to violate Section 7201. However, the history of subsection (8) does not support such a conclusion. It was added, along with subsections (2) and (3) of Section 6531, in specific response to the decision of this Court in *United States* v. *Scharton*, 285 U.S. 518, and was merely intended to insure the applicability of the longer period of limitations to all offenses, substantive or conspiratorial, involving attempts to evade or defeat taxes. See H. Conf. Rep. No. 1492, 72d Cong., 1st Sess., p. 29. This enactment clearly carried with it no implication one way or the other regarding the possible application of Section 6531(1) to any tax conspiracies.

In the *McElvain* case, McElvain and his co-defendants were indicted for conspiracy to defraud the United States by making false tax returns. In ruling that the statute of limitations barred their prosecu-

[5] Compare Section 6531(7), which extends the statute of limitations to six years for offenses under Section 7214(a), including the conspiracy described in Section 7214(a)(4).

tion, the Court stated two propositions that arguably relate to the issue in this case:

(1) The Court held that a conspiracy to violate the internal revenue laws is not an offense "arising under the internal revenue laws" (272 U.S. at 638) and that therefore the limitations provisions contained in those laws (the predecessors of Section 6531) would be inapplicable to such a conspiracy charge. It is therefore arguable that a conspiracy charged under the criminal code is subject to the general statute of limitations of Title 18, rather than the special limitations provisions of the internal revenue laws, except to the extent that the latter specifically provide otherwise.

(2) Having held that the conspiracy charged in *McElvain* did not arise under the internal revenue laws, the Court next turned to a consideration of the general limitations provisions then in effect for criminal cases, Section 1044 of the Revised Statutes. A three-year statute of limitations was there imposed, but with a proviso substituting a six-year period for "offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner * * *." This language is identical to the language of subsection (1) of Section 6531, which the courts below found to establish a six-year period of limitations. The government contended in *McElvain* that, since the object of a conspiracy to violate the tax laws necessarily encompassed an attempt to defraud the United States of its tax revenues, the proviso was applicable. But the Court rejected this argument, finding that the

language of the proviso applied only to *substantive* offenses involving defrauding and did not apply to conspiracies to commit such offenses (272 U.S. at 639). Such a holding, if applicable to the instant case, permits the argument that present Section 6531(1) does not, despite the language "whether by conspiracy or not," ever apply to a charge of conspiracy. Since petitioner was charged with conspiring to defraud the United States rather than to evade or defeat taxes, one could argue from *McElvain* that the conspiracy count of his indictment would be barred by the five-year statute of limitations generally applicable to conspiracies.

Despite the foregoing, there are indications in the *McElvain* opinion itself that it was not meant to apply to the situation presented by the current Section 6531(1) involved in this case. Although the Court did first state in *McElvain* that the conspiracy charged was not an offense "arising under the internal revenue laws" (272 U.S. at 638), it also observed that the proviso to Section 1044 did not apply because "[a]ll the various offenses under the internal revenue laws are excepted from § 1044" (*id.* at 639). Moreover, the Court referred to Section 1010(a) of the Revenue Act of 1924, which was enacted after the offense committed by McElvain, and which further included the proviso in the revenue statutes. With respect to this subsequent legislation, the predecessor to Section 6531(1), the Court stated "[a]nd § 1010(a) which prescribes for them [such revenue offenses] the same limitations as are fixed by the proviso, was unnecessary if the proviso already applied" (*ibid.*). Thus, *McElvain*

supports, as much as it negates, the conclusion that, had the defendant there committed the offense after the inclusion of the proviso in the internal revenue statutes (as did petitioner), the six-year statute would have been applicable.*

Moreover, the Court's subsequent decision in *United States* v. *Grainger*, 346 U.S. 235, reached a result (albeit without discussion) contrary to the implication in *McElvain* that the proviso does not apply to conspiracy offenses. The issue in *Grainger* involved the applicability of the World War II Suspension of Limitations Act, which contained language virtually identical to Section 6531(1), to both a substantive offense under the False Claims Act and a conspiracy to commit that substantive offense. After holding that the longer statute of limitations applied to the substantive offense, the Court stated that "[t]he same reasoning applies to a conspiracy to make false claims * * *," which also was at issue in the case. 346 U.S. at 244. Given this holding in *Grainger*, we believe it is now the law, notwithstanding *McElvain*, that the words "whether by conspiracy or not" in Section 6531(1) would encompass petitioner's conspiracy to defraud the United States by filing false tax returns. But cf. *Braverman* v. *United States*, 317 U.S. 49, 54.

c. In any event, contrary to petitioner's argument (Pet. 14, n. 4), a reversal of the conspiracy conviction

* This understanding of *McElvain* is reinforced by the observation of Judge Learned Hand in *Falter* v. *United States*, 23 F. 2d 420, 426 (C.A. 2), that "The fraud was neither an incident nor the purpose of the crime, as in *U.S.* v. *Worcek*, 271 U.S. 201, nor an offense against the revenue laws, as in *U.S.* v. *McElvain*, 271 U.S. 653."

would not require a new trial on the other counts of the indictment. The mere use of the term "conspiracy," without the introduction of incriminating evidence unrelated to the substantive accusations, could not contribute to petitioner's conviction on substantive counts "by blackening [him] with the general guilt." Cf. *United States* v. *Bentvena*, 319 F. 2d 916, 955 (C.A. 2) (concurring opinion). Petitioner has made no specific showing that the existence of the conspiracy count resulted in the introduction of evidence that would have otherwise been excludable or that it in any manner had a "substantial and injurious effect." Cf. *Kotteakos* v. *United States*, 328 U.S. 750, 776. See *Schaffer* v. *United States*, 362 U.S. 511, 516–517. Nor can petitioner make such a showing, in view of the district court's careful charge to the jury as follows (Tr. 1010):

> As you have noted, a separate crime or offense is charged in each count of the indictment, three in number. Each offense, and the evidence applicable thereto, should be considered separately. The fact that you may find the defendant guilty or not guilty of one of the offenses charged should not control your verdict with respect to the other offenses charged.

2. Even if the conspiracy conviction is not barred by the statute of limitations, petitioner alternatively argues (Pet. 13–14) that because he was the "sole human conspirator" involved in planning the evasion of the taxes of his controlled corporations, there could be no conspiracy between himself and these corporations. In support of this contention, he urges that

Union Pacific Coal Co. v. *United States,* 173 Fed. 737, 744–745 (C.A. 8), and *United States* v. *Carroll,* 144 F. Supp. 939, 942 (S.D. N.Y.), affirmed on other issues *sub nom. United States* v. *Sheba Bracelets,* 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904, are in conflict with the decision below. This question was not raised in the lower courts. Absent exceptional circumstances, there is ample precedent for this Court declining to consider the question at this stage of the proceeding. See, *e.g., Lawn* v. *United States,* 355 U.S. 339, 362, n. 16; *Duignan* v. *United States,* 274 U.S. 195, 200; *Husty* v. *United States,* 282 U.S. 694, 701–702. Cf. *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 412.

With respect to the merits of petitioner's argument, it is well settled that a corporation, acting through its agent, can be a party to a conspiracy. See, *e.g., Direct Sales Co.* v. *United States,* 319 U.S. 703. However, the authorities cited by petitioner hold that an agent of a corporation cannot conspire with his corporation, without the knowledge or participation of any other agent or officer of the corporation. See also *Poller* v. *Columbia Broadcasting,* 368 U.S. 464, 469; *Nelson Radio & Supply Co.* v. *Motorola,* 200 F. 2d 911, 914 (C.A. 5); and Note, *Developments in the Law—Criminal Conspiracy,* 72 Harv. L. Rev. 920, 951–953 (1959). On the other hand, at least one court has suggested that a conspiracy can exist where a single person acts as agent for two corporations. Under this analysis, which would be applicable to petitioner and his six controlled corporations, the corporate agent is deemed to occupy several different

roles. See *Cape Cod Food Products* v. *National Cranberry Ass'n*, 119 F. Supp. 900, 909 (D. Mass.). This rationale arguably extends the conspiracy doctrine beyond its traditional underlying assumption that collective action toward an antisocial end involves a greater risk to society than individual action toward the same end.

It is possible, however, that the manipulation of corporate entities by a single person in furtherance of economic crimes such as tax evasion or price fixing represents a modern analogue to the collective human conduct that is the basis of the classic definition of conspiracy. The combination of separate corporate entities, acting through their several human agents and with a common agent, may provide the plurality of actors traditionally required to prove a conspiracy. But we do acknowledge there is considerable merit to the argument that where, as in this case, one or more corporations and a single human agent are the only parties to an alleged conspiracy, the requisite plurality for a conspiracy is lacking. If the Court does not remand the case for reconsideration of the statute of limitations issue, and if it chooses to reach petitioner's alternative contention that he was the "sole human conspirator," it would appear that the most appropriate disposition would be a remand to the court of appeals in order that it may have an opportunity to consider and pass upon the issue.[7]

3. Finally, petitioner argues (Pet. 15) that the net worth method was improperly used to establish un-

[7] Such disposition, of course, would affect only the conspiracy count and would leave the convictions on the substantive counts undisturbed.

reported income with respect to Count II, which alleged that he had made and subscribed a false income tax return for All Star Hatcheries Inc., for its taxable year ended May 31, 1965. As part of the proof, the government introduced a four-calendar-year net worth computation for each corporation, which was designed to eliminate the confusion engendered by petitioner's scheme of "rolling" expense deductions near the end of each corporate taxable year in order to transfer otherwise reportable income from one corporation to another at the end of the "transferor's" taxable year. Since the net worth increases for All Star Hatcheries, Inc. were on a calendar year basis, they were then converted on the computation by monthly pro-ration to reflect taxable year increases as of each May 31st, Hatcheries' closing date. Thus, 7/12 of the 1964 net worth increase of Hatcheries was added to 5/12 of the 1965 net worth increase to arrive at a 12-month fiscal year net worth increase of $151,372.44, compared with the reported figure of $39,815.44. In view of this unusual situation, there is nothing improper about the use of the net worth method. Indeed, as the court of appeals stated in its opinion, upon which we rely (Pet. App. 8a):

> Having examined the exhibits and retraced the computations, we cannot accept Lowder's claim that this derivation should not have been admissible as proof of understatement. As we understand his brief, his objection amounts to a claim that the government cannot cut through the complexity of the apparent scheme to the substance of corporations' financial activities. The net worth

method was most appropriate in this case where the gross figures appearing on the books and transferred to the tax returns were suspect and the underlying documentation was unavailable. See *Johnson* v. *United States,* 325 F. 2d 709 (1 Cir., 1963). More specifically, since utilization of the different fiscal year dates was apparently an integral part of the scheme to "roll" income to avoid taxation, we think the government was properly allowed to pierce the surface by its pro-rata derivation. *Holland* v. *United States,* 348 U.S. 121, 131 (1954).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied, or, if the Court deems it appropriate, granted with respect to the conspiracy conviction and remanded to the court of appeals for reconsideration. The petition should otherwise be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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